92-998

Supreme Court, U.S.
FILED
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

ALMA FAYE RUSSELL, *Petitioner*

v.

CITY OF DALLAS AND THE BOARD OF TRUSTEES OF THE FIREMEN, POLICEMEN AND FIRE ALARM OPERATORS' PENSION FUND OF DALLAS, TEXAS, *Respondents*

APPENDIX

TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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December 9, 1992

SECTION A

Alma Faye RUSSELL, Plaintiff-
Appellant,

v.

BOARD OF TRUSTEES OF THE FIREMEN, POLICEMEN AND FIRE ALARM OPERATORS' PENSION FUND OF DALLAS, TEXAS,–and City of Dallas, Defendants-Appellees.

No. 91-1843.

United States Court of Appeals,
Fifth Circuit.

Aug. 14, 1992.

Widow of deceased fire fighter brought suit to have benefits, which were terminated upon remarriage, reinstated following divorce. The United States District Court for the Northern District of Texas, Robert B. Maloney, J., granted summary judgment in favor of pension plan trustees. Appeal was taken. The Court of Appeals, Little, District Judge, sitting by designation, held that: (1) claims alleging that plan was unlawful restraint on remarriage were barred by Texas statute of limitations; (2) alleged discriminatory act in terminating benefits due to remarriage was not continuing tort; and (3) amendment to pension plan permitting surviving spouses to receive benefits for life did not apply retroactively.

Affirmed.

1. Federal Courts *776

District court's grant of summary judgment is reviewed de novo. Fed.Rules Civ. Proc. Rule 56(c), 28 U.S.C.A.

2. Municipal Corporations *200(8)

Two-year Texas statute of limitations for torts applied to claim by Texas domiciliary alleging that surviving spouse provision of firemen pension fund, which terminated spouse's benefits on remarriage, was unlawful restraint on remarriage. 42 U.S.C.A. § 1983; V.T.C.A., Civil Practice & Remedies Code § 16.003.

3. Limitation of Actions *95(1)

Two-year Texas statute of limitations for torts begins to run on federal claim when plaintiff is aware of suffering injury or has sufficient information to know of injury. V.T.C.A., Civil Practice & Remedies Code § 16.003.

4. Municipal Corporations *200(8)

Claim by surviving spouse, that termination of fire fighter's pension benefits upon remarriage was unlawful restraint on remarriage, was untimely under Texas statute of limitations for torts when commenced more than two years after date of remarriage. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amend. 14; V.T.C.A., Civil Practice & Remedies Code § 16.003.

5. Municipal Corporations *200(8)

Breach of contract claim by surviving spouse, that fire fighter pension benefits were improperly terminated upon her remarriage, was untimely under Texas statute of limitations, when commenced more than four years after

date of remarriage V.T.C.A., Civil Practice & Remedies Code § 16.004.

6. Limitation of Actions *55(6)

Under Texas law, whether continuing tort suspended running of statute of limitations is determined by examining whether original discriminatory act had degree of permanence that should trigger claimant's awareness of and duty to assert rights.

7. Limitation of Actions *55(6)

Allegedly discriminatory act of terminating surviving spouse's fire fighter pension benefits due to claimant's remarriage was not continuing tort under Texas law, which suspended running of statute of limitations, since act of terminating benefits upon remarriage was accomplished only once and spouse's duty to assert any remaining rights commenced on date checks stopped.

8. Statutes *270

Under Texas law, amendment to statute is presumed not to apply retroactively. V.T. C. A., Government Code § 311.022.

9. Municipal Corporations *200(6)

Under Texas law, amendment to fire fighter pension plan, to provide benefits for life to surviving spouses, did not apply retroactively to spouse whose benefits had been terminated due to remarriage prior to amendment's effective

date. Vernon's Ann.Texas Civ.St.art. 6243a-1; art. 6243a, § 11B (Repealed); V.T.C.A., Government Code § 311.022.

Appeal from the United States District Court for the Northern District of Texas.

Before GARWOOD and DEMOSS, Circuit Judges, and LITTLE,[1] District Judge.

LITTLE, District Judge:

The widow of a deceased Dallas, Texas fireman seeks to have her terminated pension benefits restored. Thwarted in that endeavor by the district court's granting of summary judgments in favor of the trustees of the pension plan and the City of Dallas, the widow has appealed to this court. Finding no infirmity in the District Court's opinions, we AFFIRM the decisions for the following reasons.

I. FACTS

The facts of consequence are not in dispute. In 1976, Robert G. Russell retired from the Dallas, Texas Fire Department. Russell's years of service afforded him retirement benefits as provided by the Firemen, Policemen, and Fire Alarm Operators' Pension Fund (the Fund), Plan B (or the Plan).[2] The benefits survived Mr. Russell's

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[1]District Judge of the Western District of Louisiana, sitting by designation.

[2]Plan B is an uncodified pension plan that was created in 1973 by the voting members of the Fund. Plan B's creation

demise in 1981. Those benefits, in accordance with the Plan, were visited upon his widow, Alma Faye Russell.

The benefits terminated, again in accordance with the Plan provisions, when Alma Faye Russell remarried on 26 April 1986. The marriage ran aground and ended in divorce on 31 March 1988.[3] In February 1988, Russell sought reinstatement of Plan benefits reasoning that, upon divorce, she would reacquire widow status. The Board of Trustees (the Board) refused to reinstate Russell because the Plan specifically provided that benefits ceased upon her remarriage in 1986. According to the Plan, reinstatement was not authorized due to divorce from or death of the subsequent spouse.

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was authorized by Section 11B of the former Texas Revised Civil Statutes, Article 6243a, which allowed Fund members to create a separate pension plan by comprehensive amendment to the provisions contained in the statute. Prior to the creation of Plan B, two other separate pension plans, the "Old Pension Plan" and "Plan A," existed independently from, but under the authorization of, former Article 6243a.

On 14 June 1989, the Texas legislature enacted Article 6243a-1, the successor statute to Article 6243a. Labeled the "Combined Pension Plan," the new statute was intended to combine the Old Pension Plan and Plan A into one comprehensive plan. However, the vitality of Plan B was not threatened by the new statute, the sole purpose of which was to combine the two older pension plans. Hence, Plan B remains as a separate and uncodified pension plan, unaffected by the terms of the Combined Pension Plan.

[3]The appellant apparently reacquired the surname of Russell as a result of the divorce decree.

In April 1988, the extant members of the Pension Plan voted on a proposed Plan amendment. The voting was conducted by a written response to a written ballot. There is no dispute as to the language of the official ballot disseminated in the spring of 1988.

Voting instructions to members of the Police and Fire Pension Fund:

1. You must vote at your regularly assigned work location.
2. Sign the voter registration.
3. Vote INDIVIDUALLY on EACH amendment.
4. After voting, sign the ballot on the detachable part, detach at the perforation, and give it to the person that is in charge of the ballot box.
5. Place your ballot in the ballot box provided. These changes are authorized in each instance by either Section 11A and/or 11B of Article 6243a of the Revised Civil Status of the State of Texas, as amended, and will be incorporated into each Plan respectively, if passed by a majority of the Fund's active membership. The results will be officially canvassed and announced by the Police and Fire Pension Board at the April, 1988 Board meeting...
6. Amendment to provide the continuation of a surviving spouse's benefit for the surviving spouse's life, regardless of remarriage. *Effective on the date the Board certifies the election results (April Board meeting) for all surviving spouses receiving benefits on that date, and all future recipients.* (Emphasis supplied).

The landslide election results in favor of Plan amendment were unanimously certified by the Board on 21 April 1988, the date the amendment became effective. The plan, after the amendment, provided, in part.

(d) Survivor benefits shall be paid to all qualified survivors of members of this pension, subject to the following conditions:

(1) The qualified surviving spouse of the member shall be eligible to receive benefits for the remainder of such survivor's life.

By virtue of the April amendment, survivors' benefits would terminate on death only. Thus, termination by the first to occur of death or remarriage became a passe' standard.

Russell urged the Board that this new provision opened the door for her reinstatement. Her request for reinstatement, premised on the terms of the amendment, was denied as she was not in the category of individuals to whom expanded benefits were accorded, i.e. only those survivors *receiving benefits* would continue to receive benefits in the event of remarriage. Russell was not receiving benefits at the time of plan amendment and therefore she was not entitled to the expanded benefits.

Russell filed suit against the Board and the City of Dallas on 11 May 1990. Both defendants were dismissed by the district court after granting the summary judgment motion filed by each. The appeal we consider today was filed by Russell. We will address the appellant's complaints in serial fashion.

II. STANDARD OF REVIEW

[1] We review the district court's grant of summary judgment *de novo*, applying the same standard applied by the district court. *Wilson v. Job, Inc.*, 958 F.2d 653, 656 (5th Cir.1992). Hence, summary judgment will be proper if "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

Contrary to the assertions of appellant, the Plan is not controlled by the provisions of the Employee Retirement Income Security Act of 1974 (ERISA). Rather, this is a "government plan" that is maintained exclusively for Dallas city employees and is specifically exempt from ERISA. 29 U.S.C. § 1002(32). Appellant's suggestion that we should follow the Supreme Court's dictate for review of ERISA plans is therefore rejected.

III. ANALYSIS

The judgment of the district court bisected Russell's complaints into distinct categories: those complaints as to the Plan conditions prior to the 1988 amendment, and those complaints as to the Plan conditions subsequent to the 1988 Plan amendment. We will follow the district court's methodology.

A. Appellant's Pre-1988 Complaints.

Essentially, Russell's pre-1988 complaints center around the Plan requirement that one must retain the status of a widow or widower to draw continuously benefits from the Plan. More plainly, Russell claims that the Plan provision was an unlawful restraint on remarriage, violative of 42 U.S.C. § 1983 and the 14th amendment, and was contrary

to public policy. Additionally, she alleges breach of contract and breach of fiduciary duty causes of action.

[2] Russell did not bring her claim until more than four years after the termination of her benefits. As is well established, the prescriptive period applicable to a § 1983 claim involving an action by a Texas domiciliary is governed by the applicable Texas statute of limitations concerning torts. *Jackson v. Johnson*, 950 F.2d 263, 265 (5th Cir.1992). Moreover, appellant's complaints founded upon violations of the state and federal constitutions and the public policy of the United States and Texas, as well as the allegations of a breach of fiduciary duty, are also governed by the tort statute. A two year period is the applicable Texas statute. Tex.Civ.Prac. & Rem. § 16.003.

[3] Although Texas law mandates the limitation period and tolling rules, federal law will dictate when a cause of action arises. *Jackson*, 950 F.2d at 265. Under federal law, the period begins to run "the moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured." *Rodriguez v. Holmes*, 963 F.2d 799, 803 (5th Cir.1992)(quoting *Helton v. Clements*, 832 F.2d 332, 335 (5th Cir.1987).

[4] Russell was fully aware that she would lose her benefits after she remarried. The correspondence sent by Russell to the Board just prior to her remarriage reveals that Russell undoubtedly knew her benefits would terminate upon remarriage.[4] Pursuant to the provisions of the Plan,

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[4]In a letter to the Board dated 9 April 1986, Russell wrote:

she ceased to be a Plan participant on 26 April 1986, the date of her remarriage. In federal cases, the applicable statute of limitations is not tolled until the plaintiff's complaint is received by the court clerk. *Martin v. Demma,* 831 F.2d 69, 71 (5th Cir. 1987); Fed.R.Civ.P. 3. Thus, any complaint by appellant as to § 1983 violations, constitutional violations, public policy violations, misrepresentation or fiduciary duty violations concerning the denial of benefits upon a surviving spouse's remarriage accrued *on the date of remarriage* and would have expired more than two years prior to the filing of her suit on 11 May 1990.

[5] Applying the same date of accrual, Russell's breach of contract allegations are also barred by the applicable limitation statute. The only possible breach would have occurred when the board failed to pay Russell under the plan. Contracts are governed by a four year statute of limitations. Tex.Civ.Pract. & Rem.Code § 16.004. Russell did not commence her action by the 26 April 1990 deadline, and is therefore precluded by the limitations statute.

[6] Appellant describes the trustee's failure to pay each monthly benefit as a continuing violation that suspends the running of the statute of limitations until the payments are restored. Appellant's reliance on a continuing tort is misplaced. The test to be applied in analyzing the problem is that emanating from *Lorance v. AT & T Technologies, Inc.*, 490 U.S. 900, 109 S.Ct. 2261, 104 L.Ed.2d 961

I'm planning to get married April 26, 1986. I want to let you know in advance so you can make the *final check* correct and won't have to be returned, etc. (emphasis added)

(1989), and summarized by this circuit in *Hendrix v. Yazoo City*, 911 F.2d 1102 (5th Cir.1990):

> As *Lorance* makes clear, the distinction does not turn on the type of discrimination, but on whether the practice at issue is part of or a repetition of a past discriminatory act, in which case there is a continuing violation, or whether it is facially neutral, simply giving effect to prior discrimination, in which case there is no continuing violation.

Id. at 1104. Put succinctly, the question is: did the original discriminatory act have the degree of permanence that should trigger the claimant's awareness of and duty to assert her rights. *Berry v. Board of Supervisors of L.S.U.*, 715 F.2d 971, 981 (5th Cir.), *cert. denied*, 479 U.S. 868, 107 S.Ct. 232, 93 L.Ed.2d 158 (1986).

[7] As we have said, the discriminatory act was the termination of benefits due to claimant's remarriage. We have also recognized that appellant was unquestionably aware that her remarriage would and did sever her benefits. Her duty to assert any remaining rights in the Plan commenced on the date she stopped receiving checks.

Yet, she took no action after the checks stopped. It was not until she had filed for divorce that Russell decided to "reapply" for benefits--apparently in the mistaken belief that her return to widow status would qualify her for reinstatement. On the basis of the unambiguous terms of the Plan, the Board declined to reinstate appellant. The Board's act of terminating of Russell's benefits upon remarriage was not revisited after her divorce, it was

accomplished only once. Clearly, this is not a case involving a continuous tort.

B. Appellant's Post-1988 Complaints.

Russell reasons that she is a qualified surviving spouse (married to the member at the time of the member's death) and that the Plan B language, as amended on 26 April 1988, afforded her entitlement to benefits after that date. Again, we disagree.

[8,9] No fair reading of the either the Plan B amendment or the ballot could result in a conclusion that the amendment was applicable to anyone other than a surviving spouse receiving benefits on the effective date of plan amendment, i.e., 21 April 1988. Not only does the ballot itself specifically exclude benefits to those surviving spouses not receiving benefits as of the effective date, but the applicable Texas law requires a prospective application of the language creating plan amendment. Under Texas law, "[a] statute is presumed to be prospective in its operation unless expressly made retroactive." Tex. Gov't. Code Ann. § 311.022 (Vernon 1988). It follows, of course, that amendments are also presumed not to apply retroactively. *Skoczylas v. Federal Bureau of Prisons,* 961 F.2d 543, 554 (5th Cir. 1992); *Houston Indep. School Dist. v. Houston Chronicle Pub. Company,* 798 S.W.2d 580, 585 (Tex. App. 1990, *writ denied*).

Plain and simple, the clear language of the ballot expanded the class of beneficiaries only to those spouses receiving benefits as of 22 April 1988. To read the language more broadly would lead to absurd and unintended consequences. Because we find no issue as to any material fact as to whether Russell was retroactively covered by the Plan B

amendment, it is unnecessary to consider the district court's holding that appellant lacked standing to challenge the post amendment actions of the Board.

IV. CONCLUSION

The district court did not err in granting summary judgment against appellant on all issues. Were we to rule in favor of appellant on any issue, we may have had to consider the validity of the dismissal of the City of Dallas by the district court. We need not consider the liability of the City of Dallas as we have affirmed the district court's determination that there was no genuine issue as to any material fact that plaintiff's rights as a beneficiary in the Plan terminated on 26 April 1986 and that all possible causes of action have prescribed.

The summary judgments are AFFIRMED.

SECTION B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-1843

ALMA FAYE RUSSELL,

Plaintiff-Appellant,

versus

BOARD OF TRUSTEES OF THE FIREMEN, POLICEMEN AND FIRE ALARM OPERATORS' PENSION FUND OF DALLAS, TEXAS, and CITY OF DALLAS,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING

(September 10, 1992)

Before GARWOOD and DEMOSS, Circuit Judges, and LITTLE,* District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

REHG-4

*District Judge of the Western District of Louisiana, sitting by designation.

SECTION C

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

ALMA FAYE RUSSELL,

Plaintiff,

v. CA 3-90-1139-T

THE BOARD OF TRUSTEES OF
THE FIREMEN, POLICEMEN AND
FIRE ALARM OPERATORS PENSION
FUND OF DALLAS, TEXAS,

Defendant.

JUDGMENT

This action came on before the court on Defendant City of Dallas' Motion for Summary Judgment, Honorable Robert B. Maloney, District Judge, presiding, and the issues having been duly considered and a decision having been rendered,

It is **ORDERED and ADJUDGED** that this action is dismissed with prejudice as to the City of Dallas.

It is further **ORDERED** and **ADJUDGED** that all relief not specifically granted herein is denied.

SIGNED on this the 17th day of July 1991.

/s/
Robert B. Maloney
U. S. District Judge

/s/
JUDGMENT

SECTION D

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

ALMA FAYE RUSSELL,

Plaintiff,

v. CA 3-90-1139-T

THE BOARD OF TRUSTEES OF
THE FIREMEN, POLICEMEN AND
FIRE ALARM OPERATORS PENSION
FUND OF DALLAS, TEXAS,

Defendant.

FINAL JUDGMENT

This action came on before the court on Defendant's Motion for Summary Judgment, Honorable Robert B. Maloney, District Judge, presiding, and the issues having been duly considered and a decision having been rendered,

It is **ORDERED and ADJUDGED** that this action is dismissed with prejudice.

It is further **ORDERED** and **ADJUDGED** that all relief not specifically granted herein is denied.

SIGNED on this the 17th day of July 1991.

/s/_____
Robert B. Maloney
U. S. District Judge

/s/_____
FINAL JUDGMENT

SECTION E

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

ALMA FAYE RUSSELL,

Plaintiff,

v. CA 3-90-1139-T

THE BOARD OF TRUSTEES OF
THE FIREMEN, POLICEMEN AND
FIRE ALARM OPERATORS PENSION
FUND OF DALLAS, TEXAS,

Defendant.

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

This case is before the court on Defendant Board of Trustees October 19, 1990 Motion for Summary Judgment. After considering the motion, response, and the applicable legal authorities the court is of the opinion that the motion should be granted, and that this matter should be dismissed.

ORDER GRANTING SUMMARY JUDGMENT

Background

Plaintiff commenced this action on May 10, 1990, seeking recovery of pension benefits which she contends Defendant wrongfully denied her by conditioning continued receipt of the benefits on her remaining single after the death of her husband in 1981. After she remarried in 1986, Plaintiff's benefits were discontinued under the terms of the pension plan. Plaintiff's complaint alleges claims based on 42 U.S.C. § 1983, the United States and Texas constitutions, breach of contract, breach of fiduciary duty, and misrepresentation.

Defendant's motion seeks dismissal on statute of limitations grounds. Alternatively, Defendant contends that Plaintiff cannot meet her burden of establishing the unconstitutionality of the pension plan provisions which she challenges, and that she lacks standing to assert the remainder of the claims asserted in her complaint.

Summary Judgment Standard

Summary judgment should only be entered where the record establishes that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The movant bears the burden of establishing the propriety of summary judgment. Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986).

Once a properly supported motion for summary judgment is made, the adverse party must set forth specific facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L. Ed.2d 202 (1986). The substantive law will identify what facts are material. Id. at 248. A dispute as to a material fact is "genuine" only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Id. at 248.

Discussion

Statutes of Limitation

Plaintiff's claims depend on her ability to establish that she was improperly denied benefits to which she was entitled upon her remarriage on April 26, 1986. Unless Plaintiff can avoid summary judgment on this issue, Plaintiff lacks standing to challenge any further action taken by Defendant, as she would no longer be considered a beneficiary under the plan. See, Dallas Gay Alliance v. Dallas County Hospital District, 719 F. Supp. 1380, 1383-86 (N.D. Tex. 1989); and Harvey v. Casebeer, 531 S.W.2d 206, 208 (Tex. Civ. App.--Tyler 1975).

Plaintiff contends that Defendant unlawfully conditioned her continued receipt of survivors' benefits upon her remaining single after the death of her husband. Plaintiff contends that this policy, memorialized in § 6.07 of the relevant plan language, was an unlawful restraint on marriage, violated 42 U.S.C. § 1983 and the 14th Amendment, and was contrary to public policy.

The timeliness of Plaintiff's claim under 42 U.S.C. § 1983 is governed by the applicable Texas statute of limitations concerning personal injury. Wilson v. Garcia, 471 U.S. 261 (1985). Tex. Civ. Prac. and Rem. Code § 16.003 provides a two year limitation period for personal injury claims. The court concludes that Plaintiff's § 1983 claim accrued on April 26, 1986, the date she remarried and stopped receiving survivor benefits. As Plaintiff did not commence this action until May 11, 1990, her § 1983 claim is barred by the applicable limitation period.

Plaintiff's remaining constitutional claims regarding the validity of Plan § 6.07 are also governed by a two year statute of limitations. See Moore v. El Paso County, 660 F.2d 586, 589 (5th Cir.) cert. denied 459 U.S. 822 (1982). The court concludes that these claims accrued on April 26, 1986, and that the claims are, therefore, barred by the applicable two year statute of limitations under Tex. Civ. Prac. and Rem. Code § 16.003.

Plaintiff's remaining claims are based on events and amendments to the plan which occurred after April 26,1986. The court concludes that she lacks standing to maintain these claims. Defendant's motion for summary judgment will, therefore, be granted, and this action will be dismissed with prejudice.

It is therefore **ORDERED** that Defendant Board of Trustees October 19, 1990 Motion for Summary Judgment is granted, and that this action is dismissed with prejudice.

SIGNED on the 17th day of July 1991.

/s/
Robert B. Maloney
U. S. District Judge

SECTION F

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

ALMA FAYE RUSSELL,

Plaintiff,

v. CA 3-90-1139-T

THE BOARD OF TRUSTEES OF
THE FIREMEN, POLICEMEN AND
FIRE ALARM OPERATORS PENSION
FUND OF DALLAS, TEXAS,

Defendant.

ORDER GRANTING CITY OF DALLAS' MOTION
FOR SUMMARY JUDGMENT

This case comes before the court on the July 25, 1990 Motion for Summary Judgment filed by Defendant City of Dallas. After considering the motion, response, and the applicable case and statutory authority, the court is of

the opinion that the motion should be granted and that the City of Dallas should be dismissed from this action.

Plaintiff commenced this action seeking to recover pension benefits which she contends are owed to her. Plaintiff alleges that the City of Dallas and the Board of Trustees have violated state and federal laws and the United States and Texas constitutions by making her continued receipt of survivor benefits contingent on her marital status.

The City contends that it is not a proper party to this action. Specifically, the City argues that it is a separate entity from the Board of Trustees and that the Board of Trustees has complete control over the pension plan in issue. As a result, the City contends there is no relief which it can afford Plaintiff. Plaintiff responds that the city and Board of Trustees are intertwined so that any liability on the part of the Trustees may be imputed to the City.

After reviewing the applicable authority in the subject, the court concludes that the Board of Trustees and the City are distinct entities, that the Board has sole responsibility for administering and disbursing funds from the pension plan, and that Plaintiff could be awarded no effective relief against the City should judgment be rendered in her favor. See Tex. Rev. Civ. Stat. Ann. art. 6243a-1; and Bolen v. Board of Firemen, Policemen and Fire Alarm Operators' Trustees of San Antonio, Texas, 308 S.W.2d 904 (Tex. Civ. App.--San Antonio 1957, writ ref'd). In light of this determination, the court concludes that the City of Dallas is not a proper party to this action.

It is therefore **ORDERED** that Defendant City of Dallas' July 25, 1990 Motion for Summary Judgment is granted, and that the City of Dallas is dismissed from this action with prejudice.

It is further **ORDERED** that this case is restyled as Alma Faye Russell v. The Board of Trustees of the Firemen, Policemen and Fire Alarm Operators Pension Fund of Dallas, Texas.

SIGNED on the 17th day of July 1991.

/s/
Robert B. Maloney
U. S. District Judge

SECTION G

AMENDMENT XIV--CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION H

42 U.S.C.A. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R. S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.1

SECTION I

Section 6.07 Survivor Benefits

(a) If a member of this Pension Plan dies, either while he is an active, contributing member of this plan, or after he has ceased to be an active member but is receiving, or is eligible to receive, benefits, his qualified survivors may make application for survivor benefits.

(b) Application for survivor benefits shall be subject to the following conditions:

(1) Written application for benefits must be filed with the administrator.

(2) The application will be considered at the meeting of the Board held during the month survivor benefits are to become effective, or as soon after the date the benefits become effective as possible. No benefits will be paid, however, until the board has approved the application.

(3) The Board may require the applicant to provide proof of eligibility, such as marriage licenses, birth certificates, adoption papers or sworn statements. The Board may withhold any survivor benefits until the eligibility of the applicant has been confirmed.

(c) Qualified survivors of members of this Plan who shall be eligible for survivor benefits shall include the following:

(1) The surviving spouse of the member, providing the marriage took place before the member ended his employment with either department, either voluntarily or involuntarily, and further provided

that the surviving spouse was legally married to the member at the time of the member's death.

(2) All surviving unmarried legitimate and legally adopted children under eighteen years of age, provided they were born or adopted before the member ended his employment with either department, either voluntarily or involuntarily. Children born after the member ends his employment with either department shall also be considered qualified survivors if the mother was pregnant before the member ended his employment with either department.

(3) The surviving natural parents of the member, provided the member is not survived by a spouse or children eligible for benefits, and further provided the surviving parents were wholly dependent upon the member for their support prior to the member's death.

(d) Survivor benefits shall be paid to all qualified survivors of members of this pension plan subject to the following conditions:

(1) The qualified surviving spouse of the member shall be eligible to receive benefits for the remainder of such survivor's life or until remarriage. Upon the remarriage of the surviving spouse, including common law marriage, the survivor benefits shall cease, effective the date following the marriage date.

(2) The Board shall have the right to stop survivor benefits being paid to any surviving spouse if it has reason to believe the surviving spouse has remarried.

The Board may withhold payment of benefits until such time as the surviving spouse furnishes proof that no marriage has taken place.

(3) Any surviving spouse whose benefits are being withheld may demand a hearing before the Board and present testimony to show why his benefits should be continued. Following such a hearing, the decision of the Board regarding benefits shall be final.

(4) The qualified surviving children of the member shall be eligible to receive benefits until they reach eighteen years of age, provided they do not marry or die. A surviving child shall be paid benefits through his eighteenth birthday, including the birthdate anniversary. If a surviving child marries or dies before his eighteenth birthday, the survivor benefits shall cease, effective the date following the marriage or death.

(5) All of the surviving children of a member shall share any survivor benefits due them, with each child receiving an equal pro-rata share of the total benefit. When any one child is no longer eligible for benefits, the pro-rata shares of the remaining children shall be increased, so that the total benefit paid the surviving child or children shall always be the maximum benefit possible.

(6) No survivor benefits paid to any surviving child may be used for any purpose other than to benefit the surviving child. The Board may withhold payment of benefits if it has reason to believe such benefits are not being properly administered.

(7) Any surviving child whose benefits are being withheld may demand a hearing before the Board and present testimony to show why his benefits should be continued. Following such a hearing, the decision of the Board regarding benefits shall be final.

(8) Survivor benefits paid to surviving children living with a surviving spouse shall be delivered to the spouse who shall be required to use the benefits in behalf of the children.

(9) Survivor benefits paid to surviving children living with some person other than the surviving spouse shall be delivered to the person with whom the children are living, provided the Board has designated such person as being a suitable person to receive and administer the benefits. The Board may, however, withhold payment of benefits to anyone but the legal guardian of the children, and may require proof that a person has been appointed legal guardian of the children before authorizing any benefits to be delivered to him.

(10) Nor survivor benefits shall be paid directly to any surviving child unless the Board determines that the child is mature enough and is capable of exercising the proper discretion in handling survivor benefits due him.

(11) The qualified surviving parents of the member shall eligible to receive benefits for the remainder of their lives.

(12) The Board may require all persons receiving survivor benefits, including surviving spouses, surviving children or their guardians, and surviving parents, to file with the administrator, at least once every two years, a sworn statement concerning their eligibility to continue to receive benefits. The Board may require such a sworn statement from any person receiving survivor benefits at any time. The Board may withhold survivor benefits from any person who fails or refuses to file such a statement when requested to do so.

(13) When the last qualified survivor of any member becomes ineligible to continue to receive survivor benefits, then that survivor shall be paid in a lump sum an amount equal to the difference, if any, between the total amount of all contributions made to this Pension Plan by the member prior to his retirement or death, and the sum of all benefits paid to the member and/or all of his qualified survivors. The total amount to be paid in benefits to the member and all survivors shall never be less than the total amount of contributions the member made to this Pension Plan.

SECTION J

Section 6.07 Survivor Benefits

(The following changes made herein shall apply to all current Plan B active members, retirees, and survivors; the effective date of the amendment is _____ ____, 1988 (the date that the Board certifies the election results)).

(a) and (b) NO CHANGES

(c) Qualified survivors of members of this Plan who shall be eligible for survivor benefits shall include the following:

(1) NO CHANGE

(2) All surviving unmarried legitimate and legally adopted children under ~~eighteen~~ nineteen (19) years of age, provided they were born or adopted before the member ended his employment with either department, either voluntarily or involuntarily. Children born after the member ends his employment with either department shall also be considered qualified survivors if the mother was pregnant before the member ended his employment with either department.

(3) NO CHANGE

(d) Survivor benefits shall be paid to all qualified survivors of members of this pension plan subject to the following conditions:

(1) The qualified surviving spouse of the member shall be eligible to receive benefits for the remainder of such survivor's life ~~or until remarriage. Upon the remarriage of the surviving spouse, including common law marriage, the survivor benefits shall cease, effective the date following the marriage date.~~

(2) ~~The Board shall have the right to stop survivor benefits being paid to any surviving spouse if it has reason to believe the surviving spouse has remarried. The Board may withhold payment of benefits until such time as the surviving spouse furnishes proof that no marriage has taken place.~~ RESERVED

(3) NO CHANGE

(4) The qualified surviving children of the member shall be eligible to receive benefits until they reach ~~eighteen~~ nineteen (19) years of age, provided they do not marry or die. A surviving child shall be paid benefits through his ~~eighteenth~~ nineteenth (19th) birthday, including the birthdate anniversary. If a surviving child marries or dies before his ~~eighteenth~~ nineteenth (19th) birthday, the survivor benefits shall cease effective the date following the marriage or death. However, disabled child(ren) shall not be removed from participation in the division of such pension benefits upon reaching the age of ~~eighteen (18)~~ nineteen (19) years where the disability originated before reaching are twenty-three (23) if the Board finds:

(a) through (e) NO CHANGES

A finding relating to this type of disability is subject to review and change by the Board as in all other cases.

(5) through (13) NO CHANGES

SECTION K

Section 6.07 Survivor Benefits

(a) If a member of this Pension Plan dies, either while he is an active, contributing member of this plan, or after he has ceased to be an active member but is receiving, or is eligible to receive benefits, his qualified survivors may make application for survivor benefits. The qualified surviving spouse of a member identified in Section 5.03 (c) or the guardian of qualified surviving children of a member identified in Section 5.03 (c), if no surviving spouse exist, shall have the option to select the pension plan from which survivor benefits are received, provided that the deceased vested or active member has contributed to the plan selected. Provided further that a survivor who elects to receive benefits under the Old Plan or Plan A shall be entitled to be reimbursed from the pension fund the difference between the member's contributions to Plan B and the contributions that would have been made during the same period to the plan from which the survivor elects to receive benefits. A survivor desiring a refund of such excess contributions must make application for the refund with the Administrator within three years of the date she/he makes application for survivor benefits. In no event shall the option contained in this subsector be available to survivors of a retiree who had, at the time of his death, already applied for retirement benefits from the Fund and selected a plan under which to retire as provided in Section 5.03 (c).

(b) Application for survivor benefits shall be subject to the following conditions:

(1) Written application for benefits must be filed with the administrator.

(2) The application will be considered at the meeting of the Board held during the month survivor benefits are to become effective, or as soon after the date the benefits become effective as possible. No benefits will be paid, however, until the Board has approved the application.

(3) The Board may require the applicant to provide proof of eligibility, such as marriage licenses, birth certificates, adoption papers or sworn statements. The board may withhold any survivor benefits until the eligibility of the applicant has been confirmed.

(c) Qualified survivors of members of this Plan who shall be eligible for survivor benefits shall include the following:

(1) The surviving spouse of the member, providing the marriage took place before the member ended his employment with either department, either voluntarily or involuntarily, and further provided that the surviving spouse was legally married to the member at the time of the member's death.

(2) All surviving unmarried legitimate and legally adopted children under nineteen (19) years of age, provided they were born or adopted before the member ended his employment with either department, either voluntarily or involuntarily. Children born after the member ends his employment with either department shall also be considered qualified survivors if the mother was pregnant before the member ended his employment with either department.

(3) The surviving natural parents of the member, provided the member is not survived by a spouse or children eligible for benefits, and further provided the surviving parents were wholly dependent upon the member for their support prior to the member's death.

(d) Survivor benefits shall be paid to all qualified survivors of members of this pension plan subject to the following conditions:

(1) The qualified surviving spouse of the member shall be eligible to receive benefits for the remainder of such survivor's life.

(2) RESERVED

(3) Any surviving spouse whose benefits are being withheld may demand a hearing before the Board and present testimony to show why his benefits should be continued. Following such a hearing, the decision of the board regarding benefits shall be final.

(4) The qualified surviving children of the member shall be eligible to receive benefits until they reach nineteen (19) years of age, provided they do not marry or die. A surviving child shall be paid benefits through his nineteenth (19th) birthday, including the birthdate anniversary. If a surviving child marries or dies before his nineteenth (19th) birthday, the survivor benefits shall cease effective the date following the marriage or death. However, disabled child(ren) shall

not be removed from participation in the division of such pension benefits upon reaching the age of nineteen (19) years where the disability originated before reaching age twenty-three (23) if the Board finds:

(a) Such child(ren) are so physically or mentally handicapped, either congenitally or through injury suffered or disease contracted, as to be unable to support themselves or to secure and hold any gainful employment or pursue an occupation; and

(b) Such child(ren) are not married; and,

(c) Such disability was not the result of an occupational injury for which the child(ren) receive compensation equal or greater than that provided under this Section and if the child(ren) received less than the amount provided under this Section the Fund shall pay the difference; and,

(d) Such disability was not self-inflicted; and,

(e) Such disability did not occur while committing a felony.

A finding relating to this type of disability is subject to review and change by the Board as in all other cases.

(5) All of the surviving children of a member shall share any survivor benefits due them, with each child receiving an equal pro-rata share of the total benefit. When any one child is no longer eligible for benefits, the pro-rata shares of the remaining children shall be increased, so that the total benefit paid the surviving child or children shall always be the maximum benefit possible.

(6) No survivor benefits paid to any surviving child may be used for any purpose other than to benefit the surviving child. The Board may withhold payment of benefits if it has reason to believe such benefits are not being properly administered.

(7) Any surviving child who benefits are being withheld may demand a hearing before the Board and present testimony to show why his benefits should be continued. Following such a hearing, the decision of the Board regarding benefits shall be final.

(8) Survivor benefits paid to surviving children living with a surviving spouse shall be delivered to the spouse who shall be required to use the benefits in behalf of the children.

(9) Survivor benefits paid to surviving children living with some person other than the surviving spouse shall be delivered to the person with whom the children are living, provided the Board has designated such person as being a suitable person to receive and administer the benefits. The Board may, however, withhold payment of benefits to anyone but the legal guardian of the children, and

may require proof that a person has been appointed legal guardian of the children before authorizing any benefits to be delivered to him.

(10) No survivor benefits shall be paid directly to any surviving child unless the Board determines that the child is mature enough and is capable of exercising the proper discretion in handling survivor benefits due him.

(11) The qualified surviving parents of the member shall be eligible to receive benefits for the remainder of their lives.

(12) The Board may require all persons receiving survivor benefits, including surviving spouses, surviving children or their guardians, and surviving parents, to file with the administrator, at least once every two years, a sworn statement concerning their eligibility to continue to receive benefits. The Board may require such a sworn statement from any person receiving survivor benefits at any time. The Board may withhold survivor benefits from any person who fails or refuses to file such a statement when requested to do so.

(13) When the last qualified survivor of any member becomes ineligible to continue to receive survivor benefits, then that survivor shall be paid in a lump sum an amount equal to the difference, if any, between the total amount of all contributions made to this Pension Plan by the member prior to his retirement or death, and the sum of all benefits paid to the member and/or all of his qualified survivors. The total amount to be paid in benefits to

the member and all survivors shall never be less than the total amount of contributions the member made to this Pension Plan.